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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism*

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with General Assembly resolution 66/171 and Human Rights Council resolution 15/15.

* Late submission to incorporate comments received by Member States.

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Summary

This is the second annual report submitted to the General Assembly by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

The key activities undertaken by the Special Rapporteur between 3 April and 31 August 2012 are listed in section II of the present report. In section III, the Special Rapporteur has evaluated the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009) (and amended by resolution 1989 (2011)) and its compatibility with international human rights norms, assessing in particular its impact on the due process deficits inherent in the Council's Al-Qaida sanctions regime. The report makes recommendations for amending the mandate to bring it into full conformity with international human rights norms.

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I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, pursuant to General Assembly resolution 66/171 and Human Rights Council resolutions 15/15 and 19/19. It sets out the activities of the Special Rapporteur conducted between 3 April and 31 August 2012 and evaluates the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009) (and amended by resolution 1989 (2011)) and its compatibility with international human rights norms, assessing in particular its impact on the due process deficits inherent in the Council's Al-Qaida sanctions regime. The report makes recommendations for amending the mandate to bring it into full conformity with international human rights norms.

II. Activities of the Special Rapporteur

2. On 12 April 2012, the Special Rapporteur addressed the Sub-Committee on Human Rights of the European Parliament in the context of a public hearing on secret rendition and detention practices held under the theme: "How to protect human rights while countering terrorism?". He referred to the work undertaken by four special procedures mandates, namely, the Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and on torture and other cruel, inhuman or degrading treatment or punishment, as well as the Working Group on Arbitrary Detention and the Working Group on Enforced and Involuntary Disappearances to follow up on the Joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42). In his presentation, he addressed human rights concerns in relation to activities conducted by intelligence services in countering terrorism and emphasized the need for oversight over their activities, recalling that terrorism suspects should be tried in ordinary criminal courts in public proceedings affording fair trial standards, including prompt access to a lawyer of their choice following arrest.

3. In May 2012, the Special Rapporteur met in Strasbourg, France, with the newly appointed Commissioner for Human Rights of the Council of Europe and the European Commission for Democracy through Law (Venice Commission).

4. Between April and June 2012, the Special Rapporteur held meetings with a number of Member States, non-governmental organizations, including victims' organizations, and other stakeholders in relation to his thematic report to the Human Rights Council on the framework principles for securing the human rights of victims of terrorism (A/HRC/20/14 and Add. 1 and 2).

5. From 11 to 13 June, the Special Rapporteur attended the nineteenth annual meeting of special procedures mandate holders of the Human Rights Council, held in Geneva.

6. On 20 June, the Special Rapporteur presented his report on the framework principles for securing the human rights of victims of terrorism (A/HRC/20/14 and Add. 1 and 2) to the twentieth session of the Human Rights Council and held a press conference. On that occasion, he also participated as a panellist in a side event held on the theme "Human rights implications of the U.S. targeted killing programme", jointly organized by the American Civil Liberties Union, the Center for

Constitutional Rights, the International Commission of Jurists and the International Federation for Human Rights.

7. In June 2012, the Special Rapporteur attended the third review by the General Assembly of the United Nations Global Counter-terrorism Strategy. He participated in the symposium held on the theme "Dialogue, understanding and countering the appeal of terrorism", organized by the President of the General Assembly in partnership with the Global Counter-Terrorism Implementation Task Force and the Interregional Crime and Justice Research Institute.

8. On 27 June, the Special Rapporteur participated as a panellist in a debate held on the theme "Future of the targeted sanctions one year after splitting the 1267 regime: the 1267/1989 and 1988 regimes: current status and future challenges", hosted by Germany, with the Ombudsperson of the Al-Qaida Sanctions Committee, Kimberly Prost.

9. On 5 and 6 July 2012, the Special Rapporteur participated in the third regional expert symposium on fair trial and due process in the counter-terrorism context held in Brussels, providing an intervention related to the investigation and pre-trial phase for persons suspected of terrorism offences, including administrative detention regimes and procedures for review.

10. On 9 and 10 July 2012, the Special Rapporteur participated in a high-level conference on victims of terrorism, held in Madrid.

11. During the relevant period, the Special Rapporteur also met or consulted with a wide range of stakeholders relevant to the 1267/1989 sanctions regime, as described in section III of the present report.

III. Evaluation of the impact of the Office of the Ombudsperson on the 1267/1989 Al-Qaida sanctions regime, and its compatibility with international human rights norms

12. Since its inception, the sanctions regime established by Security Council resolution 1267 (1999) has evolved in nature and scope into a permanent tool of the United Nations global counter-terrorism apparatus, more closely resembling a system of international law enforcement than a temporary political measure adopted by the Security Council with a view to averting an imminent threat to international peace and security. As a result, the regime has been subject to frequent criticism for its failure to incorporate a mechanism of independent judicial review (see paras. 14 and 20-21 below). The present report evaluates the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009) (and amended by resolution 1989 (2011)) and its compatibility with international human rights norms, assessing in particular its impact on the due process deficits inherent in the Council's Al-Qaida sanctions regime. For the purposes of this report, the Special Rapporteur has consulted with the Chair of the Al-Qaida Sanctions Committee established pursuant to resolution 1989 (2011), the Sanctions Committee as a whole, the Analytical Support and Sanctions Monitoring Team established pursuant to resolution 1526 (2004), individual States and the Ombudsperson herself. He also received representations from many of the lawyers representing individuals who have filed delisting petitions with the Office of the Ombudsperson. He wishes to extend his thanks to all of those who have contributed to this review.

A. Legal framework

13. In its current form, the Al-Qaida sanctions regime requires all States to impose a range of measures, including asset freezes, international travel bans and arms embargoes on individuals and entities designated by the Sanctions Committee as being associated with Al-Qaida.[1] These sanctions typically result in a denial of access by listed individuals to their own property, a refusal of social security benefits, limitations on their ability to work and restrictions on their ability to travel domestically and internationally. They significantly interfere with the right to freedom of movement, property rights and the right to privacy in all its manifestations. The impact on both the designated person and his or her family can be severe,[2] leading one domestic court to characterize designated individuals as "effectively prisoners of the State".[3] The reputational cost is incalculable. Moreover, as individual listings under the current regime are open-ended in duration, they may result in effective permanent designation.

14. The adoption of a measure that enables the Security Council to make listing decisions on the basis of nominations by Member States provides a ready means by which individual States can make executive decisions with far-reaching consequences, apparently unconstrained by domestic judicial review, or the international human rights treaties by which they are bound. Predictably, therefore, the regime has come under sustained and strongly worded criticism over the years.[4] The concerns of the international community were summed up in 2009 by the report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights of

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[1] See Security Council resolution 1989 (2011).

[2] See *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 6; European Court of Justice (ECJ), Case C-340/08 *R (M and Others) v. Her Majesty's Treasury*, Judgement 29 April 2010, ECJ (Fourth Chamber).

[3] *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 60.

[4] See A/HRC/16/50, paras. 17-22 and 44; A/63/223, para. 16; A/65/258, paras. 55-57; Bardo Fassbender, "Targeted sanctions: listing/de-listing and due process", study commissioned by the United Nations, Office of Legal Affairs (2006); Council of Europe, Parliamentary Assembly, resolution 1597 (2008), para. 7; 2007 Marty Report, document 11454 (Council of Europe, Parliamentary Assembly); I. Cameron, "The European Convention on Human Rights, due process, and the United Nations Security Council counter-terrorism sanctions", report commissioned by the Council of Europe (2006); David Cortright and Erika de Wet, "Human rights standards for targeted sanctions", (Sanctions and Security Research Program, January 2010); I. Johnstone, "The United Nations Security Council, counter-terrorism and human rights", in *Counter-terrorism: Democracy's Challenges*, Andrea Bianchi and Alexis Keller, eds. (Oxford, Hart Publishing, 2008); Josiane Auvret-Finck, "Le contrôle des décisions du Conseil de sécurité par la Cour européenne des droits de l'homme", and Constance Grewe, "Les exigences de la protection des droits fondamentaux", in *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne Équilibres et déséquilibres de la balance*, Constance Grewe et al., eds., (Brussels, 2010); Dire Tladi and Gillian Taylor, "On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting", 10 *Chinese Journal of International Law* (2011); Security Council Cross-Cutting Report on the Rule of Law, No. 3 (28 October 2011), available at www.securitycouncilreport.org; Anthony Aust, "The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View", in *Review of the Security Council by Member States*, Erika de Wet and Andre Nollkaemper, eds.; Eric Rosand, "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions", 98 *American Journal of International Law*, 745 (2004).

the International Commission of Jurists.[5] Referring to the "virtually uniform criticism of the system as it presently operates", the Panel agreed with the Council of the Europe Parliamentary Assembly that the sanctions regime "violates the fundamental principles of human rights and the rule of law" and was therefore "unworthy" of an international institution.[6]

15. The root of the problem lies in a conflict of international legal norms. Since the Security Council is a political organ,[7] its traditional decision-making structures lack the procedural mechanisms necessary to protect the due process rights of the individual. These rights are enshrined in international human rights treaties, and are broadly reflected in national and regional legal systems. Some "core" due process rights are today recognized as rules of customary international law, including the fundamental axiom *nemo debet esse judex in propria sua causa* (no one may be a judge in his own cause).[8]

16. Under the Al-Qaida regime, the Council, through its Sanctions Committee, is responsible for designating individuals and entities on the Consolidated List and for adjudicating upon applications for their removal. This is inconsistent with any reasonable conception of due process, and gives the appearance that the Council is acting above and beyond the law. However, some members of the Council are unwilling to cede their Chapter VII powers to any form of binding review by an independent body. Indeed, some argue that this would be contrary to the provisions of the Charter of the United Nations itself, and therefore would be *ultra vires*.

17. The Special Rapporteur does not share this analysis. While the Security Council is primarily a political body, rather than a legal one, it exercises both quasi-legislative and quasi-judicial functions in the present context.[9] Under Articles 25 and 103 of the Charter, States are required to comply with binding decisions of the Council adopted under Chapter VII, even where this would entail violating their obligations under another international treaty.[10] Given the

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[5] See International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva, International Commission of Jurists, 2009).

[6] Ibid., pp. 116-117.

[7] See Hans Kelsen, "Collective Security and Collective Self-Defence under the Charter of the United Nations", 42 *American Journal of International Law*, 783 (1948).

[8] See CCPR/C/21/Rev.1/Add.6 (1994), para. 8; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, pp. 96-97 (Clarendon, 1989); International Bar Association, *International Terrorism: Legal Challenges and Responses: A Report by the International Bar Association Task Force on Terrorism*, p. 71 (2004); Luis Condorelli, "Conclusions", in *Les évolutions de la protection juridictionnelle des fonctionnaires internationaux et européens — développements récents*, G. M. Palmieri, ed., p. 359 (Brussels, 2012); Security Council Cross-Cutting Report.

[9] See Jeremy Matam Farrall, *United Nations sanctions and the rule of law* (Cambridge, Cambridge University Press, 2007); Jose Alvarez, *International Organizations as Law-Makers* (New York, Oxford University Press, 2005).

[10] See International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America and Libyan Arab Jamahiriya v. United Kingdom*, ICJ Reports, vol. 1, p. 16, para. 42, and p. 113, para. 39 (1992); International Court of Justice, *Nicaragua v. United States of America*, ICJ Reports, p. 392, para. 107 (1984); *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 11.

presumption in international law against normative conflict,[11] human rights treaty bodies have developed a principle of construction to the effect that Council resolutions should be read subject to a presumption that it was not the Council's intention to violate fundamental rights.[12] In the case of the Al-Qaida sanctions regime, however, the language of the relevant resolutions does not allow for this approach.[13]

18. The powers of the Security Council are defined and limited by the Charter[14] (as well as being constrained by *jus cogens* norms of customary international law[15]). By Article 24, paragraph 2, of the Charter, the Council, when exercising its powers under Chapter VII, is bound to act in accordance with the purposes of the United Nations as defined in Article 1, which include both the maintenance of international peace and security and the promotion of respect for human rights. The General Assembly and the Council have frequently emphasized that these imperatives do not pull in opposite directions.[16] In its most recent review of the United Nations Global Counter-Terrorism Strategy in July 2012, the General Assembly again called upon all United Nations entities involved in supporting counter-terrorism efforts to continue to facilitate the promotion and protection of human rights, due process and the rule of law.[17] As former Secretary-General Kofi Annan has observed, the rule of law is a concept at the "very heart" of the United Nations mission.[18]

19. In 2005, the World Summit Outcome document called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures existed for placing individuals and entities on sanctions lists, for

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[11] See A/CN.4/L.682, para. 37.

[12] See CCPR/C/94/D/1472/2006 ("*Sayadi and Vinck v. Belgium*"), Separate Opinion of Sir Nigel Rodley; European Court of Human Rights, *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber), paras. 101-102.

[13] See *Nada v. Switzerland*, Case No. 10593/08, European Court of Human Rights, 10 September 2012, para. 172.

[14] See International Court of Justice, *Conditions of Admission of a State to the United Nations (Charter, Article 4)*, advisory opinion, ICJ Reports 1948, p. 57; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, 2 October 1995, IT-94-1-AR72, para. 28.

[15] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 325, Separate Opinion of Judge Lauterpacht, p. 440, para. 100; A/CN.4/L.778, International Law Commission, Draft Articles on the Responsibility of International Organizations, article 26 (30 May 2011); Stefan Talmon, "Security Council Treaty Action", *Revue Helénique de Droit International*, p. 68 (2009); Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions", 16 European Journal of International Law 59 (2005); *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, 2 October 1995, IT-94-1-AR72, para. 296; *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Court of First Instance of the European Communities, Case T-315/01, 21 September 2006, para. 230; *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber) and *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 151.

[16] See resolution 60/288.

[17] See resolution 66/282, para. 9.

[18] See S/2004/616, para. 6.

removing them and for granting humanitarian exemptions.[19] On 22 June 2006, at the conclusion of its thematic debate on the rule of law, the Security Council expressed its commitment to carrying this recommendation forward.[20] The Council itself has acknowledged that human rights and international law should guide counter-terrorism initiatives.[21] Pertinently, the Council has, since 2008, included a statement to this effect in the preamble to each of its resolutions on the 1267/1989 sanctions regime.

20. Pursuant to Article 39 of the Charter, the Council has determined that international terrorism associated with Al-Qaida represents a threat to international peace and security, and that an effective sanctions regime adopted under Article 41 is necessary to address that threat. Since the Council lacks enforcement mechanisms of its own, however, it is dependent on the ability of States to implement its resolutions. Even if the Council itself is not formally bound by international human rights law when acting under Chapter VII (a proposition that is heavily disputed[22]), there is no doubt that Member States are bound by human rights obligations when implementing Council decisions. Experience has shown that the absence of an independent judicial review mechanism at the United Nations level has seriously undermined the effectiveness and the perceived legitimacy of the regime. National and regional courts and treaty bodies, recognizing that they have no jurisdiction to review Council decisions per se,[23] have focused their attention instead on domestic measures of implementation, assessing their compatibility with fundamental norms of due process. A series of successful legal challenges has highlighted the problem by quashing implementing legislation, or declaring it unlawful, for precisely this reason.[24]

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[19] See resolution 60/1, para. 109.

[20] See PRST/2006/28.

[21] Security Council resolution 1456 (2003).

[22] See Frédéric Mégret and Florian Hoffman, "The United Nations as a human rights violator? Some reflections on the United Nations changing human rights responsibilities", *Human Rights Quarterly*, vol. 25, No. 2 (May 2003), p. 317; and René Cassin, "La déclaration universelle et la mise en oeuvre des droits de l'homme", in *Recueil des cours (1951-II) Académie de droit international*, vol. 79; Andrea Bianchi, "Security Council's anti-terror resolutions and their implementation by Member States", *Journal of International Criminal Justice*, vol. 4, issue 5, p. 1062 (2006); A/65/258, para. 17; and A/64/10.

[23] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008, para. 287; CCPR/C/94/D/1472/2006 (*Sayadi and Vinck v. Belgium*), para. 7.2; *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber), para. 76; *Nada v. Switzerland*, Case No. 10593/08, European Court of Human Rights, 10 September 2012, Concurring Opinion of Judge Malinverni, para. 20; and *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 151.

[24] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008; CCPR/C/94/D/1472/2006 ("*Sayadi and Vinck v. Belgium*"), Separate Opinion of Sir Nigel Rodley; *Abdelrazak v. The Minister of Foreign Affairs* [2009] FC 580; *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534; Case T-85/09 *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24.

21. The most recent such decision is the Judgement of the Grand Chamber of the European Court of Human Rights in *Nada v. Switzerland*.[13] The Court held that restrictions on the applicant's freedom of movement, imposed by an ordinance of the Swiss Federal Council implementing resolution 1267 (1999) (as amended) had violated his right to respect for his private life, in breach of article 8 of the European Convention on Human Rights. Of much greater practical significance, however, was the Court's finding of a violation under article 13 of the Convention (the right to an effective domestic remedy). The Court concluded that in the absence of effective judicial review at the United Nations level, there was a duty on State parties to the Convention to provide an effective remedy under national law. This implied a full review on fact and law by an entity with jurisdiction to determine whether the measures were justified and proportionate in the individual case and power to order their removal.[25] The Nada Judgement thus echoes the approach of the European Court of Justice and the General Court in the Kadi litigation,[26] holding that regional implementing measures taken by the European Commission were to be judged against human rights standards binding on the Community institutions. However, the principle in the Nada case has wider geographical ramifications than the Kadi litigation since it applies to all 47 member States of the Council of Europe, including three permanent members of the Security Council.

22. Foreshadowing the decision in the Nada case, the former Special Rapporteur had already expressed the view that as long as there is no effective and independent judicial review of listings at the United Nations level "it is essential that listed individuals and entities have access to domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999)".[27] However, domestic judicial review is not an adequate substitute for due process at the United Nations level since the State responsible for implementation may not have access to the full justification for the listing (see para. 25 below). Even if it does, it may not have the designating State's consent to reveal the information.[28] This can obstruct the ability of national or regional courts to carry out an effective judicial review.[29] More generally, as the High Commissioner for Human Rights has observed, the ability of individuals and entities to challenge their listing at the national level

[25] See *Nada v. Switzerland*, Case No. 10593/08, European Court of Human Rights, 10 September 2012, Concurring Opinion of Judge Malinverni, paras. 23-25; see also Josiane Auvret-Finck, "Le contrôle des décisions du Conseil de sécurité par la Cour européenne des droits de l'homme", and Constance Grewe, "Les exigences de la protection des droits fondamentaux", in *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne. Équilibres et déséquilibres de la balance*, Constance Grewe et al., eds. (Brussels, 2010).

[26] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008; see also Case T-85/09 *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24.

[27] A/65/258, para. 58; see also model provision on judicial review of terrorist listings: A/HRC/16/15, paras. 33-35.

[28] See *Hay v. HM Treasury* [2009] EWHC 1677; *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534.

[29] See *R (Hany Youssef) v. Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2091 (Admin) 23 July 2012.

remains constrained by the obligation on Member States under Articles 25 and 103 of the Charter.[30]

23. While none of the judicial rulings to date has directly impugned Council resolutions,[31] their effect has been to render those resolutions effectively unenforceable. If the measures cannot be lawfully implemented at the national and regional levels, then the logic of universal sanctions falls away, raising the spectre that targeted funds could begin migrating towards those jurisdictions that cannot lawfully implement the regime. It is therefore imperative that the Council find a solution that is compatible with the human rights standards binding on Member States. The Council's powers under the Charter are broad enough to achieve this.[32] When an organ of an international organization acts to fulfil one of its purposes, it is presumed to be acting within its powers.[33] Under Chapter VII, it is for the Council to judge whether measures it is proposing to adopt are consistent with the objectives of the Charter.[34] The Council has explicitly recognized that the domestic and regional legal challenges to the implementation of the sanctions regime threaten its effectiveness.[35] In the opinion of the Special Rapporteur, it inevitably follows that the Council has power under Chapter VII to enhance the effectiveness of the regime by establishing an independent adjudicator at the United Nations level with jurisdiction to review and overturn a designation by the Committee.[36] This would promote international peace and security by strengthening the regime's enforcement, as well as harmonizing the imperatives in Article 1, paragraphs 1 and 3 of the Charter, as envisaged by the General Assembly (see para. 18), resolving the conflict of international norms currently impeding implementation (see paras. 20-22) and honouring the purposive synthesis outlined in the preamble to resolution 1989 (2011) (see para. 19). It would not entail any impermissible delegation of Chapter VII powers since it would require the adoption by the Council of a resolution in which the Council would voluntarily undertake to abide by the conclusions of an independent adjudicator, and the Council could, at any time, revoke or amend the relevant resolution. Review by an independent adjudicator would not be directed to decisions of the Council, but to those of a subordinate body exercising delegated

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[30] See A/HRC/16/50, para. 19.

[31] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008, para. 287; CCPR/C/94/D/1472/2006 ("*Sayadi and Vinck v. Belgium*"), para. 7.2; *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber), para. 76; and *Nada v. Switzerland*, Case No. 10593/08, European Court of Human Rights, 10 September 2012, Concurring Opinion of Judge Malinverni, para. 20.

[32] See *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, 2 October 1995, IT-94-1-AR72, para. 28.

[33] See International Court of Justice, *Certain Expenses of the United Nations* (Article 17, para. 2, of the Charter), advisory opinion of 20 July 1962, ICJ Reports 1962, p. 151, p. 168.

[34] See European Court of Human Rights, *Behrami v. France*, *Saramati v. France, Germany and Norway* [2007] 45 EHRR SE 85 at para. 148; *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 11; see also footnote 31.

[35] See Security Council resolution 1989 (2010), eleventh preambular paragraph.

[36] Indeed, it was the view of the former Special Rapporteur that the absence of independent judicial review rendered the current regime *ultra vires* the Council's Chapter VII powers (see A/65//258, para. 57).

executive powers. The Special Rapporteur concludes that there is no sustainable *vires* objection to the establishment of a mechanism of independent judicial review. In the words of the Secretary-General: "The evolution of international law has led to more and more rights being divested directly in the individual. ... The time has come to align the law applicable to the United Nations with the developments in international human rights law."[37]

B. Al-Qaida sanctions regime

24. Under resolution 1989 (2011), activities indicating that an individual or entity is "associated with" Al-Qaida include any form of support (financial or otherwise) for the acts or activities of Al-Qaida, or any cell, affiliate, splinter group or derivative thereof.[38] This reflects the definitional difficulties inherent in targeting an entity that cannot be categorized as an organization per se, and that has no readily identifiable or coherent command and control structure, and no criteria for membership.[39] The Council has thus signalled an expansive targeting strategy, leaving considerable latitude for judgement by those involved in administering the regime.[40]

25. The Al-Qaida Sanctions Committee is comprised of diplomats representing all 15 members of the Security Council, and is assisted by the Monitoring Team established under resolution 1526 (2004).[41] States may nominate any individual or entity they consider to meet the criterion of "association" with Al-Qaida (see para. 4), providing that the nomination is accompanied by a description of the information that forms the basis for the proposed designation (the "statement of case") along with certain identifying information.[42] The Security Council, in its resolution 1822 (2008), introduced a system for publicly disclosing "narrative summaries" that are intended to notify the listed individual or entity of the reasons for the listing. These summaries are prepared with the assistance of the Monitoring Team,[43] but they may be edited to remove any information the designating State considers sensitive.[44] The summaries appear on the Committee website, and consist

[37] A/65/318, para. 94.

[38] See Security Council resolution 1989 (2011), para. 4.

[39] As the Monitoring Team has pointed out, Al-Qaida "increasingly represents an idea of violent opposition to a whole range of local and global circumstances rather than a coherent group with fixed goals."; see S/2005/83, annex, para. 9; see also S/2012/600.

[40] The Monitoring Group has informed the Special Representative that the designation of groups claiming adherence to Al-Qaida without necessarily having any genuine association is treated by the Committee as a "matter of political judgment"; thus, for example, Al-Shabaab and Boko Haram have not been designated "at this time" but may be designated in the future if the Committee judges this to be appropriate.

[41] See Security Council resolution 1989 (2011), annex I.

[42] See Security Council resolutions 1617 (2005), 1735 (2006), para. 5, 1822 (2008), para. 12 and 1989 (2011), para. 13. Previously, in its resolution 1526 (2004), para. 17, the Security Council had merely encouraged States to include identifying and background information to the greatest extent possible.

[43] See Security Council resolution 1989 (2011), annex I, para. (k).

[44] By its resolution 1904 (2009), the Security Council introduced a presumption that the full statement of case would be published except for those parts that the designating State identified as confidential.

of allegations expressed with varying degrees of specificity, typically lacking any detailed explanation of the evidential basis on which the assertion is made.

26. Proposals for designation are adopted on a consensus basis by members of the Committee acting on instructions from their capitals. In practice, the Committee follows a "no objection" procedure, so that if no State has opposed a listing proposal (or has put it "on hold") within 10 working days, the individual or entity will be added to the list. The designating State (which may or may not be a member of the Committee) is generally expected to have reviewed the underlying evidence. While some States have clear procedures for conducting such a review, others do not. Significantly, the Committee as a whole does not examine the evidence justifying a designation, and it may not have all the relevant information available to it.[45] Bilateral diplomatic negotiations and selective disclosure of intelligence sometimes takes place prior to a designation among States sympathetic to one another's positions, and there is no duty on designating States to disclose exculpatory information to the Committee.[46] The political and diplomatic character of the listing process has raised concerns that the regime is open to misuse as a means of targeting individuals and entities in order to advance national political goals essentially unrelated to Al-Qaida,[47] or even that States might use listing "as a convenient means of crippling political opponents".[48]

C. Enhancing due process in the Al-Qaida sanctions regime

1. Mandate

27. On 17 December 2009, the Council adopted resolution 1904 (2009), which introduced an independent Ombudsperson for an initial period of 18 months to assist the Committee in its consideration of delisting requests. The first Ombudsperson, Kimberly Prost, a former ad litem judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 with 20 years experience as a federal prosecutor in Canada, was appointed by the Secretary-General on 3 June 2010. Under resolution 1904 (2009), she was mandated to investigate delisting requests according to the procedure set out in annex II to the resolution and to prepare a "comprehensive report" for the Committee within a set time frame. She is also required to report to the Council twice a year on the operation of her mandate.

28. There were two major shortcomings to the procedure under resolution 1904 (2009). The first was that the Ombudsperson was given no formal power to make

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[45] The Security Council, in its resolution 1989 (2011), recognized this problem: see para. 18, which merely calls upon Member States to share with the Committee "any information they have available regarding a listing request, so that this information may help inform the Committee's decision on designation".

[46] See A/65/258, para. 54.

[47] See Security Council Cross-Cutting Report on the Rule of Law, No. 3 (28 October 2011), p. 35; and Anthony Aust, "The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View", in *Review of the Security Council by Member States*, Erika de Wet and Andre Nollkaemper, eds., pp. 31-38.

[48] *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 181.

recommendations. Ms. Prost nonetheless took the view that her comprehensive reports should address, to the defined standard, the question whether the continued listing was justified. Resolution 1989 (2011) recognizes and now endorses this practice and gives the Ombudsperson a mandate to make consequential recommendations regarding processed delisting requests.[49]

29. The second shortcoming was that a consensus of the Committee was required for delisting. The most far-reaching change introduced by resolution 1989 (2011) was to reverse this consensus presumption. A delisting recommendation by the Ombudsperson now takes effect automatically 60 days after the Committee completes its consideration of the comprehensive report, unless the Committee decides otherwise by consensus. If there is no consensus, any member of the Committee may refer the delisting request to the Security Council (the "trigger mechanism" procedure).[50]

30. According to the latest available figures, there are currently 238 individuals and 68 entities on the Consolidated List. The Ombudsperson has received 30 delisting petitions, of which 19 cases have completed the delisting process, resulting in the delisting of 16 individuals and 24 entities (one petition concerned 1 individual and 23 related entities). Without seeing the underlying information, it is difficult for the Special Rapporteur to draw firm conclusions from the raw data. All that can be said with confidence is that the high proportion of petitions that have resulted in delisting tends to suggest that the Ombudsperson process has been effective in those cases that have so far been processed. At the same time, it underlines in stark terms the fallibility potential of the entries on the Consolidated List, thereby reinforcing the imperative need for fair and clear listing and delisting procedures that meet international minimum standards.

31. Prior to the amendments made by resolution 1989 (2011), the mandate of the Ombudsperson had been assessed for compatibility with minimum standards of due process by the United Nations High Commissioner for Human Rights,[51] the former Special Rapporteur,[52] the General Court of the European Union,[53] and the Supreme Court of the United Kingdom.[54] While welcoming the introduction of an independent element to the procedure, they each concluded that the mandate of the Ombudsperson under resolution 1904 (2009) failed adequately to address the due process-related concerns previously expressed about the regime, identifying 10 key objections: (i) the mandate of the Ombudsperson did not confer a power to overturn decisions of the Committee; (ii) the Committee therefore continued to act as judge in its own cause; (iii) delisting required a consensus within the Committee; (iv) the Ombudsperson lacked a power of recommendation; (v) disclosure of information to the Ombudsperson or the Committee was subject to the unfettered discretion of

[49] See Security Council resolution 1989 (2011), para. 21.

[50] See Security Council resolution 1989 (2011), para. 23. The same procedure is now to be followed where the designating State submits a delisting request; ibid., para. 27.

[51] See A/HRC/16/50, paras. 17-22 and 44.

[52] See A/65/258, paras. 55-56; see also Martin Scheinin, "Is the ECJ Ruling in Kadi Incompatible with International Law?", in *Yearbook of European Law*, vol. 28 (Oxford University Press, 2010).

[53] See Case T-85/09 *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24, para. 128.

[54] See *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, paras. 78, 80-81 and 239.

States; (vi) the Ombudsperson's authority to disclose sensitive information to the petitioner was similarly at the discretion of States; (vii) there was no requirement that the petitioner be informed of the identity of the designating State; (viii) neither the comprehensive report, nor the Ombudsperson's conclusions, could be disclosed to the petitioner; (ix) the Committee was under no obligation to provide reasons for its decision; and (x) the office of the Ombudsperson lacked the authority to grant appropriate relief where human rights were violated.

32. Some of these criticisms have been addressed by resolution 1989 (2011). With regard to issues (i) to (iv) above, the effect of the reversal of the consensus requirement in resolution 1989 (2011) is to create a strong presumption that the Ombudsperson's recommendation to delist will be honoured by the Committee. This significantly increases the traction of the mandate, but the ultimate decision-making power continues to reside with the Committee or, in the event of disagreement, with the Security Council. So far, the Committee has exercised a self-denying ordinance with respect to the "trigger mechanism",[55] but there has been at least one instance in which it reportedly came close to being used.[56] If the Committee, by consensus, decides not to accept a delisting recommendation, or if the "trigger mechanism" is used, the requirements of independence and impartiality would be openly flouted since in that situation "the accuser is also the judge".[57] The more finely balanced question is whether the mere existence of this possibility vitiates the regime as a whole.

33. There are no grounds for concluding that the present Ombudsperson lacks personal independence or impartiality. The Special Rapporteur notes that she has gone to very considerable lengths to make her Office as effective as possible in affording petitioners a measure of procedural justice. She has succeeded in delivering significant due process improvements, and has demonstrated independence of mind, an ability to gain the confidence of all stakeholders, and a personal determination to make the system as fair and effective as it can be within the limits of her mandate.

34. However, as regards an (objective) appearance of independence, the structural flaws remain the same. The United Nations Human Rights Committee has held that the power of an executive body to "control or direct" a judicial body "is incompatible with the notion of an independent tribunal".[58] The European Court of Human Rights has similarly held that a requirement for quasi-judicial determinations to be ratified by an executive body with power to vary or rescind it contravenes the "very notion" of an independent tribunal.[59] This principle does not depend upon a perception that the existence of such a power might indirectly influence the manner in which such a body handles and decides cases.[60] The "very existence" of an executive power to overturn the decision of a quasi-judicial body is sufficient to deprive that body of the necessary "appearance" of independence

[55] See S/2012/590, para. 30.

[56] See http://www.reuters.com/article/2012/07/02/us-un-sanctions-saudi-idUSBRE86100D20120702.

[57] See *Abdelrazak v. The Minister of Foreign Affairs* [2009] FC 580.

[58] CCPR/C/GC/32, para. 19.

[59] See European Court of Human Rights, *Findlay v. United Kingdom* (1997), 24 EHRR 221.

[60] See European Court of Human Rights, *Van de Hurk v. Netherlands* (1994), 18 EHRR 481, para. 45.

however infrequently such a power is exercised, and irrespective of whether its exercise was, or even could have been, at issue in any particular case.[61]

35. It follows that, despite the significant improvements brought about by resolution 1989 (2011), the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee.[62] The Special Rapporteur endorses the recommendation of the High Commissioner for Human Rights that the Security Council must now explore "every avenue of possibility" for establishing "an independent quasi-judicial procedure for review of listing and delisting decisions".[63] This necessarily implies that the Ombudsperson's comprehensive reports should be accepted as final by the Committee and that the decision-making powers of the Committee and Council should be removed. To reflect this modification, the Special Rapporteur invites the Security Council to consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator.

36. Security of tenure is an important additional guarantee of judicial independence.[64] Short terms of office that are periodically renewable by the executive are generally considered incompatible with the requisite appearance of independence.[65] While there is no indication that the present Ombudsperson has been in any way influenced by the requirement for her mandate to be renewed every 18 months, the test is once again an objective one. The Special Rapporteur accordingly recommends that the mandate of the Office of the Independent Designations Adjudicator/Ombudsperson be for a term of no less than three years.

37. The Special Rapporteur notes that requests for humanitarian exemptions under resolution 1989 (2011) must be put before the Committee by the individual's State of citizenship or residence, and that they remain subject to the Committee's consensus decision-making procedure. If the relevant State is unsympathetic, the request may never reach the Committee agenda. The Monitoring Team has suggested that individuals should be able to petition the Ombudsperson directly for humanitarian exemptions. The Special Rapporteur considers that such applications constitute the determination of a "civil right" under international human rights law, and accordingly recommends that they be brought within the mandate of the Office of the Independent Designations Adjudicator/Ombudsperson.

2. Procedural issues

38. The Ombudsperson has encountered considerable difficulties in obtaining information that States consider to be sensitive, for reasons of national security or otherwise. The Security Council, in its resolution 1989 (2011), urges States to provide the Ombudsperson with relevant confidential information where

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[61] See European Court of Human Rights, *Bryan v. United Kingdom* (1995), 21 EHRR 342, para. 38.

[62] See *R (Hany Youssef) v. Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2091 (Admin), 23 July 2012, para. 50; see also *Silver v. United Kingdom* (1983), EHRR 347 (Ombudsperson lacking power to grant binding decision not an effective remedy).

[63] See A/HRC/16/50, paras. 27 and 44.

[64] CCPR/C/GC/32, para. 19.

[65] See European Court of Human Rights, *Incal v. Turkey* (2000), 29 EHRR 449; UKPC, *Starrs and Chalmers v. Procurator Fiscal*, 2000 SLT 42; UKHL, *Millar v. Dickson* [2002] 1WLR 1615.

appropriate,[66] but imposes no duty to do so, even where the information may be decisive for a delisting request. This represents a significant limitation on the Ombudsperson's ability to examine the full facts, a challenge she describes as "pressing and significant".[67]

39. The Ombudsperson has so far negotiated bilateral agreements for the disclosure of confidential information with 11 States.[68] These agreements typically include restrictions on the use that may be made of the confidential information, prohibiting its onward disclosure to the petitioner, or to other members of the Committee, and prohibiting reference to it in the comprehensive report, without the express consent of the providing State. Resolution 1989 (2011) imposes an obligation on the Ombudsperson to respect any confidentiality condition that a State may impose.[66] Questions that the Ombudsperson may need to ask the petitioner in connection with such material must first be vetted by the providing State.

40. If a State elects not to share confidential information with the Ombudsperson, she obviously cannot take it into account in her report. While this provides some incentive to a designating State to disclose inculpatory material,[69] it does little to counterbalance the procedural unfairness to the petitioner. This is because there is no means of preventing the undisclosed information from being held against the petitioner in the decision-making process. The State concerned may elect to disclose information bilaterally to other Committee members, or to the Committee as a whole, without disclosing it to the Ombudsperson;[70] it may disclose information to the Ombudsperson, but refuse to give permission for its onward disclosure to the petitioner; or it may refer the delisting request to the Security Council, where any permanent Member can exercise a veto. Any one of these eventualities would be fundamentally inconsistent with international standards of due process.

41. If the recommendation of the Special Rapporteur contained in paragraph 59 (a) below is accepted, then the approach the Ombudsperson has so far adopted would provide the basis for a solution. Domestic administrative and judicial tribunals have developed rules of procedure for scrutinizing intelligence information that a State is unwilling to disclose to the subject.[71] This experience provides a useful guide to the procedural modifications necessary to enable such material to be judicially reviewed in an inter-State context.[72] If, despite the availability of suitably adapted procedures, a State remains unwilling to disclose relevant information, or to authorize its onward disclosure to the individual, then it is excluded from the decision-making process, thereby eliminating the risk of unfairness.

42. The European Court of Human Rights has held that where judicial review of a counter-terrorism measure is based solely or to a decisive degree on intelligence

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[66] See Security Council resolution 1989 (2011), para. 25.

[67] S/2012/590, para. 12.

[68] See S/2012/590, paras. 12-13.

[69] See S/2012/600, p. 4.

[70] The Monitoring Team has pointed out to the Special Rapporteur that if States will not share critical information with [the Ombudsperson], they will have to do so with members of the Committee or accept that in that case sanctions are not the appropriate tool.

[71] See Kent Roach, "The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations", in *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*, Nicola McGarrity, Andrew Lynch and George Williams, eds. (London, Routledge, 2010).

[72] See General Court of the European Union, C-27/09 P, *French Republic v. People's Mojahedin Organization of Iran*, Judgement of 21 December 2011, Opinion of Advocate General Sharpston.

material that has not been disclosed to the subject, the procedure falls short of the essential requirements of due process.[73] As a "core irreducible minimum" the individual must be provided with sufficient information to enable him or her to give an effective answer to the allegations.[73] The Supreme Court of the United Kingdom has followed this approach in *Secretary of State for the Home Department v. AF*.[74]

43. The Ombudsperson considers that she has managed to convey to the petitioners the essential case against them in sufficient detail to enable them to answer it.[75] Lawyers acting for petitioners, on the other hand, have informed the Special Rapporteur that they had to guess at the case their clients had to meet, requiring "speculative lawyering" that was difficult to reconcile with their professional obligations. Due to the lack of transparency in the process, it is impossible for the Special Rapporteur to provide an objective assessment of these competing views. What is certain, however, is that the regime allows for the possibility that the petitioner (and even the Ombudsperson) may be kept in ignorance of information that is decisive to the outcome of a delisting petition. In the view of the Special Rapporteur, the only effective way to rectify this unfairness would be for the Security Council to adopt the recommendation in paragraph 59 (a) below, in accordance with the principles set out in paragraphs 17 to 23 and 34 and 35 above.

44. One of the emblematic criticisms of the regime is that the petitioner currently has no right to know the identity of the designating State. The Security Council, in its resolution 1989 (2011), strongly encourages designating States to give permission for their identity to be revealed, but stops short of requiring this.[76] The Ombudsperson has recommended that where fairness necessitates disclosure of this information, there should be no requirement for the designating State's consent.[77] The Special Rapporteur agrees with this assessment.

45. A further striking feature of the current procedures is the absence of any duty on Member States to disclose exculpatory information. Lawyers acting for petitioners have satisfied the Special Rapporteur that there have been instances in which key exculpatory material was withheld. Rudimentary principles of procedural fairness dictate that a petitioner should have access to any information in the possession of States that might support a delisting application,[78] including any indication that a confession or statement was obtained by torture or ill treatment.[79] The Special Rapporteur recommends that States be subject to an express obligation to indicate whether or not there is such material in their possession; and that a State's refusal to authorize the disclosure of any such material to the Office of the Independent Designations Adjudicator/Ombudsperson, or its onward disclosure to the petitioner, should provide an independent ground for delisting since such a stance would otherwise frustrate a full and fair judicial review.

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[73] See European Court of Human Rights, *A. v. United Kingdom* (2009) 49 EHRR 29, para. 218.

[74] See *Secretary of State for the Home Department v. AF*, [2010] 2 AC 269 HL, paras. 57 and 83.

[75] See S/2012/590, paras. 30-32.

[76] See Security Council resolution 1989 (2011), para. 14.

[77] See S/2012/590, para. 45.

[78] See, mutatis mutandis, European Court of Human Rights, *Jespers v. Belgium* (1981) 27 DR 61; *Rowe and Davis v. United Kingdom* (2000) 30 EHRR 1; *Foucher v. France* (1997) 25 EHRR 234; SCC, *Stinchcombe* [1991] 3 SCR 326; and *Chaplin* [1995] 1 SCR 727.

[79] See CCPR/C/GC/32, para. 33.

46. When confronted with an allegation that information may have been obtained by torture, the Ombudsperson proceeds with caution, making enquiries of the State that submitted the information to the greatest extent possible. In assessing the information she takes due account of the reliability implications, as well as the presence or absence of untainted independent corroboration. She also looks for patterns of consistency in assessing the probative value of the information. She does not, however, necessarily exclude information that was or may have been obtained by torture from her assessment since she does not consider herself bound by formal rules of evidence.

47. The Special Rapporteur is gravely concerned by this approach. Lawyers acting for the petitioners have satisfied him that intelligence derived from torture has been used to justify the designation of individuals. The prohibition of torture is *jus cogens*, and article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements that are established to have been made as a result of torture shall not be invoked as evidence in any proceedings. In *A and others v. Secretary of State for the Home Department (No. 2)*,[80] the United Kingdom House of Lords held that a tribunal reviewing intelligence material in a counter-terrorism context could not lawfully consider information obtained by torture (even if it had formed part of the material relied upon by the executive body whose decisions were under review). It also held that when faced with intelligence emanating from detainee reporting in a State known to practice torture, a judicial authority was required to conduct an investigation into the manner in which the intelligence had been obtained and, if satisfied that it was obtained through torture, to disregard it altogether, irrespective of its apparent probative weight.

48. The provisions of article 15 of the United Nations Convention against Torture apply to any proceeding before a judicial or administrative authority in which evidence is assessed under formal procedural rules and in which a decision is rendered.[81] The Special Rapporteur considers that the mandate of the Ombudsperson constitutes such a proceeding, and that if it were a national procedure it would be caught by article 15 of the Convention directly. He endorses, in this regard, the view of the former Special Rapporteur that receipt and reliance on intelligence obtained through torture involves complicity in the commission of an internationally wrongful act and is irreconcilable with the obligation *erga omnes* to cooperate in the eradication of torture.[82] He also shares the deep concern of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment at attempts to limit the exclusionary principle to national court proceedings, and agrees that receiving information that may be compromised by torture implicitly condones and validates the use of torture, and creates a market for information so acquired.[83]

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[80] See *A and others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71.

[81] See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture, A Commentary*, pp. 531-532 (New York, Oxford University Press, 2008).

[82] See A/HRC/10/3, para. 55; and International Criminal Tribunal for the Former Yugoslavia, Furundzija, 10 December 1998, IT-95-17/T10, para. 151.

[83] See A/HRC/16/52, paras. 53-56.

49. The Special Rapporteur accordingly considers that where there is a plausible basis[84] for believing that intelligence information may have been obtained through torture, the Office of the Independent Designations Adjudicator/Ombudsperson is under an obligation to investigate the manner in which the information was obtained. It is then for the designating State to establish that the information was not so obtained.[85] If, after investigation, there remains a real risk that torture was used to obtain the evidence, it must be excluded from consideration by the Office of the Independent Designations Adjudicator/Ombudsperson altogether, regardless of its apparent probative value.[86] The Special Rapporteur strongly recommends the introduction of an express provision to this effect.

50. At present, neither the report of the Ombudsperson nor her recommendation may be made public or disclosed to the petitioner. The Ombudsperson considers that these restrictions "unnecessarily impair the transparency" of the process.[87] The Monitoring Team also supports some increased transparency.[88] If the present system is retained, the Special Rapporteur agrees that the Ombudsperson should be permitted to disclose her recommendation to the petitioner, and further recommends that, subject to any necessary redactions, the comprehensive reports of the Ombudsperson be published.

51. Under the current procedure, the Committee is required to give reasons to the petitioner when rejecting an application for delisting,[89] but not where it accepts a delisting recommendation. The Committee has adopted a practice of giving rudimentary reasons in all cases, and the Ombudsperson has recommended that this should become mandatory.[90] The Special Rapporteur concurs with the recommendation of the Ombudsperson that the Committee should give reasons in all cases, and further recommends that the Committee's reasons should be as full as possible, and should in all cases be made public.

52. The right to legal representation is fundamental to the fairness of the delisting procedure. Out of a total of 30 applications received by the Ombudsperson, 21 have so far been legally represented. However, many of the lawyers acting for petitioners have done so pro bono, since there is no mechanism for funding legal representation comparable to those established by the international criminal tribunals. International standards require States to fund the legal defence of an accused person if he or she lacks the means to pay for counsel.[91] The Special Rapporteur recommends that such a mechanism be introduced for the delisting process under the Al-Qaida sanctions regime.

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[84] Information derived from detainee reporting in a State known to practise torture is sufficient to provide such a plausible basis (see *A and others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71).

[85] See *G.K. v. Switzerland*, CAT/C/30/D/219/2002.

[86] See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture, A Commentary*, p. 534 (New York, Oxford University Press, 2008).

[87] See S/2012/590, paras. 38-43.

[88] See S/AC.37/2012/COMM.48, para. 39.

[89] See Security Council resolution 1989 (2011), annex II, paras. 13-14.

[90] See S/2012/590, para. 44.

[91] See International Covenant on Civil and Political Rights, art. 14; European Court of Human Rights, art. 6; and Inter-American Commission on Human Rights, art. 8 (2)(e); Security Council resolution 1452 (2002) allows an exemption to be made with regard to frozen assets for the payment of legal fees. Many petitioners are, however, indigent. Moreover, as regards the procedural obstacles for securing humanitarian exemptions (see para. 37 of the present report).

53. In order to ensure that the interaction between the petitioner and the Office of the Independent Designations Adjudicator/Ombudsperson is effective, it needs to be conducted in a language the petitioner understands. This is a right recognized in most international human rights instruments.[91] At present, the Office of the Ombudsperson does not have the facilities to ensure translation of documents or interpretation during interviews.[92] This needs to be urgently rectified.

54. The Ombudsperson has made it clear that it is not her function to consider whether the original listing was justified, but whether continued listing remains justified in current circumstances. This is governed by the standards set by the Security Council, including its interpretation of the term "associated with" Al-Qaida (see para. 24 above). The preamble to resolution 1989 (2011) states that sanctions measures are intended to be "preventative in nature and are not reliant upon criminal standards set out under national law".[93] In defining her standard of review the Ombudsperson has sought to balance the essentially preventative nature of the regime against the significant detriments to which designated individuals and entities are subjected.[94] The test she applies is whether there is "sufficient information to provide a reasonable and credible basis for the continued listing".[94] The Ombudsperson looks for specificity and other indicia of reliability,[95] and will not attach significant weight to information that is vague, anonymous or otherwise unsourced, unless it is corroborated. Lack of detail and specificity "remains a serious problem", according to the Ombudsperson.[95]

55. While the objective of the sanctions imposed under the 1267 regime may be preventative and deterrent, their impact on designated individuals and entities is comparable in nature to a penal sanction.[96] The distinction is not, in any event, entirely clear-cut. The Human Rights Committee has observed that certain measures must be regarded as penal, regardless of their formal classification, because of their "character or severity",[97] and the European Court of Human Rights has observed that preventative and deterrent objectives "may be seen as constituent elements in the very notion of punishment".[98] The sanctions under the Al-Qaida regime have rightly been characterized as "drastic and oppressive" and as "paralysing".[99] The quasi-penal nature of the measures raises two fundamental questions: what standard of proof should be required for listing and delisting decisions, and whether sanctions under the regime should last indefinitely or be time-limited.[100]

56. The Special Rapporteur agrees with the Ombudsperson that the standard for listing and delisting should be the same, and that a test of mere suspicion would set the threshold far too low.[101] He notes, however, that there is a range of familiar

[92] See S/2012/590, paras. 54-56.

[93] See Security Council resolution 1989 (2011), fourteenth preambular paragraph.

[94] See http://www.un.org/en/sc/ombudsperson/approach.shtml.

[95] See S/2012/590, para. 34.

[96] They have been described by the High Commissioner for Human Rights as "clearly punitive" (see A/HRC/16/50, para. 17) and by the former Special Rapporteur as a "criminal punishment" (see A/63/223, para. 16).

[97] CCPR/C/GC/32, para. 15.

[98] European Court of Human Rights, *Welch v. United Kingdom*, (1995) 20 EHRR 247, para. 30.

[99] *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 6.

[100] Ibid., para. 58.

[101] See http://www.un.org/en/sc/ombudsperson/approach.shtml.

legal standards between mere suspicion and the internationally recognized criminal standards that are precluded by resolution 1989 (2011). These intermediate standards include reasonable grounds for suspicion, reasonable grounds for belief, and proof on the balance of probabilities. The "reasonable and credible basis" test adopted by the Ombudsperson does not clearly differentiate between them, or indicate which standard is to be applied.

57. The answer must be divined from the language of the resolution, which indicates only that national criminal standards of proof are inappropriate. Given the quasi-penal consequences of these measures, the standard of review must be set as high as possible, consistent with the terms of the resolution. This would require the Committee and the Office of the Independent Designations Adjudicator/Ombudsperson to be satisfied on the material available to them that the allegation of association with Al-Qaida is at least more likely than not to be true (a "balance of probabilities" test).[102] Further, the standard must incorporate a proportionality element, if it is to meet the requirements laid down by the European Court of Human Rights in *Nada v. Switzerland*,[103] and as envisaged by the High Commissioner for Human Rights[104] and the Human Rights Committee.[105] Where the imposition of the measures would involve a disproportionate interference with a protected human right, the Office of the Independent Designations Adjudicator/Ombudsperson should have power to issue a delisting decision. The Office of the Independent Designations Adjudicator/Ombudsperson should therefore be required to recommend delisting, unless she is satisfied on the material made available to her (a) that it is more likely than not that the designated individual or entity is associated with Al-Qaida, within the meaning of resolution 1989 (2011); and (b) that the imposition of sanctions constitutes a proportionate interference with the fundamental rights of the designated person or entity.

58. A further aspect of the regime that has caused concern is the indeterminate nature of the sanctions imposed on designated individuals and entities. When viewed in combination with the severity of the measures imposed, the risk that sanctions will become effectively permanent gives them the colour of a penal sanction. The General Court of the European Union has observed that due to the length of time individuals remain listed "the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one".[106] The Monitoring Team has also expressed the view that time limits would help to prevent the continuation of listings through inertia. Considering the need to reinforce the temporary and preventative purpose of the sanctions imposed under the 1267/1989 regime, the Special Rapporteur recommends that the Security Council should revisit proposals previously advanced

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[102] See *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, para. 58.

[103] See *Nada v. Switzerland*, Case No. 10593/08, European Court of Human Rights, 10 September 2012.

[104] See A/HRC/16/50, para. 19.

[105] See CCPR/C/94/D/1472/2006 ("*Sayadi and Vinck v. Belgium*"), Separate Opinion of Sir Nigel Rodley.

[106] Case T-85/09 *Yassin Abdullah Kadi v. European Commission*, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24, para. 150.

by the "like-minded" group of States[107] for the introduction of a "sunset clause" imposing a time limit on the duration of designations.

IV. Conclusions and recommendations

59. **The Special Rapporteur acknowledges and welcomes the significant due process improvements brought about by resolution 1989 (2011), but nevertheless concludes that the Al-Qaida sanctions regime continues to fall short of international minimum standards of due process, and accordingly recommends that:**

(a) **The mandate of the Office of the Ombudsperson should be amended to authorize it to receive and determine petitions from designated individuals or entities (i) for their removal from the Consolidated List and (ii) for the authorization of humanitarian exemptions; and to render a determination that is accepted as final by the Al-Qaida Sanctions Committee and the Security Council. In consequence:**

(i) **The Security Council should consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator;**

(ii) **The rules of procedure should make provision for States to disclose information to the Office of the Independent Designations Adjudicator on conditions of confidentiality, but should nonetheless ensure a full and fair review in accordance with the principles outlined in paragraphs 38 to 44 above;**

(iii) **Subject to any necessary redactions on security grounds, the Office of the Independent Designations Adjudicator should be mandated to deliver a reasoned public determination;**

(b) **Irrespective of whether the recommendation in paragraph 59 (a) is adopted by the Security Council:**

(i) **The mandate of the Office of the Independent Designations Adjudicator/Ombudsperson should be renewed for a term of no less than three years;**

(ii) **The Office of the Independent Designations Adjudicator/ Ombudsperson should be required to recommend delisting, unless satisfied on the information available that (a) it is more likely than not that the designated individual or entity is associated with Al-Qaida; and (b) the imposition of sanctions constitutes a proportionate interference with the rights of the designated person or entity;**

[107] The informal group of like-minded countries on targeted sanctions includes: Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland; see *Les fondements de notre ordre juridique court-circuites par l'ONU*, 1 March 2010, motion passed by the Foreign Policy Commission of the Federal Parliament of Switzerland.

(iii) Where fairness requires disclosure of the identity of the designating State, the Office of the Independent Designations Adjudicator/ Ombudsperson should be authorized to disclose this information to the petitioner without the need for the designating State's consent;

(iv) The mandate should make express provision requiring the disclosure of exculpatory information to the petitioner as envisaged in paragraph 45 above;

(v) Where the Office of the Independent Designations Adjudicator/ Ombudsperson considers that there is a plausible basis for believing that information may have been obtained through torture, and the designating State is unable to establish that it was not so obtained, the information should be excluded;

(vi) The Security Council should make provision for funding the legal representation of indigent petitioners, and for adequate interpretation and translation facilities;

(vii) The Security Council should reconsider the introduction of a "sunset clause" imposing a time limit on the duration of all designations;

(c) If the recommendation in paragraph 59 (a) is not adopted:

(i) The Ombudsperson should be mandated to disclose the recommendation in her comprehensive report to the petitioner when the report is submitted to the Committee;

(ii) The Committee should be required to give reasons, in all cases that are as full as possible and address the issues raised by the petitioner;

(iii) Subject to any necessary redactions on security grounds, both the comprehensive report of the Ombudsperson and the reasons given by the Committee should be made public.